FILE COPY

Office - Supreme Court, U. S
FILED
NOV 16 1937
CHARLES ELMORE CROPLEY
CLERK

In The

Supreme Court of the United States

October Term, 1937. No. 45.

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, SEYMOUR J. PHILLIPS and ABRAHAM S. PHILLIPS, Surviving Executors Under the Will of I. L. PHILLIPS, Deceased,

Petitioners,

v.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, I. A. COOMBE, T. H. COOMBE, ROY UPDEGRAVE, ALVARETTA UPDEGRAVE, Administratrix of the Estate of R. R. UPDEGRAVE, Deceased, and MARGARET WILKINSON, Administratrix, d.b.n.c.t.a. of the Estate of B. C. GULDIN, Deceased,

Respondents.

Pro se

BRIEF FOR ONE OF THE RESPONDENTS, NAMELY, MARGARET WILKINSON, ADMINISTRATRIX d.b.n.c.t.a. OF THE ESTATE OF B. C. GULDIN, DECEASED.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Margaret Wilkinson, Pro se
PRALL B. ROADS,
Schuylkill Trust Bldg.,
Pottsville, Penna.
Atty. for Respondent above named.

Pottsville Republican-Schuylkill Reporter Print

ARGUMENT

The plaintiffs in this case, to wit, Phillips-Jones Corporation, Individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving Executors under the Will of I. L. Phillips, Deceased, in their Amended Bill of Complaint filed in the District Court of the United States for the Eastern District of Pennsylvania sitting in equity, asked for a decree directing contribution on the part of the respondents toward the payment of an assessment made by the Commissioner of Internal Revenue against I. L. Phillips, one of the stockholders and one of the transferees of the assets of the Coombe Garment Company, a Pennsylvania corporation, a corporation which liquidated its business and distributed its assets as liquidating dividends to its stockholders between July 15, 1919 and September 27, 1919.

The assessment made by the Commissioner of Internal Revenue against the said I. L. Phillips was entered on or about June 16, 1926, and represented unpaid income and profits taxes assessed against the said Coombe Garment Company for the years 1918 and 1919.

The above assessment made by the Commissioner of Internal Revenue was contested by the Executors of the said I. L. Phillips, the case finally coming before this Court and being decided adversely to the executors: *Phillips et al., Executors vs. Commissioner of Internal Revenue,* 283 *U. S.* 589.

Referring to the Amended Bill filed by the plaintiffs in this case and duly served, one of the respondents, namely, Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, deceased, filed a motion to dismiss.

Argument was heard on the said Amended Bill and the motion to dismiss, before the District Court of the United States, and that Court thereafter entered a decree dismissing the Bill for want of equity, and filed an opinion therewith in which that Court said, inter alia: (*record page* 21):

> "We accept the equitable doctrine relied upon by the plaintiff that when one is forced to pay a debt owing by himself and others he has a legal right to enforce contribution. The basis of it however is the debt obligation of the contributors. Here there is no debt obligation and hence no legal obligation to contribute. The most which can be said, and all which is averred in this Bill is that the tax which was assessed against Phillips might have been assessed against the defendants. Conceding that it might, the fact remains that it was not assessed. Neither the possibility nor liability to assessment imposed the tax. It was imposed wholly by the assessment and imposed upon Phillips alone. This was his misfortune. It may be and doubtless is true that he might have demanded that the tax be assessed against all. If it had been each would have been liable in solido for the whole up to what he had received from the corporation. If one had under compulsion paid the whole tax he could have enforced contribution from the others. Here, again, however, the demand would have rested upon the debt obligation. None, we repeat, is averred in this Bill. Again, Phillips when he was assessed

might have asked the others to agree that he should oppose the assessment on behalf of all and that the others would contribute. If they had so agreed there would have been a debt obligation. None however is averred."

"An analogue is supplied by tort feasors whose negligence has contributed to an injury. Each is liable to the person injured and either may alone be made a defendant and compelled to pay the whole damage. This, it may be said, is not fair nor just. The law of Pennsylvania has recognized this and provided a remedy. Without it, however, the defendant sued would not have a legal right to contribution notwithstanding that it might well be said that he 'ought' to be reimbursed. This is the claim presented by this Bill. The view taken renders it unnecessary to discuss the special grounds of demurrer."

"A decree dismissing the Bill for want of equity may be submitted."

Whereupon, the plaintiffs filed a petition for a re-hearing, which was granted, and thereupon that Court again entered a decree dismissing the Amended Bill of the plaintiffs for want of equity, and filed an opinion therewith in which that Court said, inter alia; (*Record page* 31):

"7. We can understand that any one might think that all stockholders should contribute proportionately to the payment of this tax. We can enter into the feelings of the plaintiff that selecting Phillips from among all the stockholders and requiring him to pay the whole tax was an arbitrary and unjust act. The injustice of it however did not prevent the

exaction from being made. The thought that the other stockholders should contribute is no legal reason for compelling them to do so. This compulsion can arise only because they have incurred a legal or equitable obligation to contribute. If there is no obligation to pay the tax there is none to contribute to its payment. The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay. Here there has been no assessment and hence there is no obligation to pay."

Whereupon, the plaintiffs appealed to the United States Circuit Court of Appeals for the Third Circuit, and that Court after argument, entered a decree affirming the decree of the District Court in dismissing the Bill in Equity filed by the plaintiffs, and filed an opinion therewith in which that Court said, inter alia: (*Record page* 37):

"The right to contribution is of necessity dependent upon a prior determination that the appellees are liable for the corporation deficiency tax. It was unsuccessfully argued to the Supreme Court that Phillips should not be solely liable for the entire sum of the deficiency. The inequity to Phillips is not without justification. The decision provide that the Commissioner may assess a tax in the summary fashion provided for by the 1926 Act; by a bill in equity, as in *Leighton v. United States*, 289 *U. S.* 506; or by an action at law, as in the cases cited in note 2 in *Phillips v. Commissioner*, *supra*. Phillips had the right to contest, and his executors did, in fact, contest the assessment before the Board of Tax Appeals, the Circuit Court of Appeals and the Supreme Court, with the Commissioner at all times a party liti-

gant. Phillips' executors would have had an opportunity to contest had the Commissioner initiated proceedings against them by a bill in equity or by an action at law. The contentions of the appellants, however, if sustained, would deprive the appellees of a similar right. Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commissioner prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established.

"The decree of the District Court dismissing the bill in equity is affirmed."

Whereupon, the plaintiffs applied to this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, which was granted.

As stated by the United States Circuit Court of Appeals in its opinion referring to the case of *Phillips vs. Commissioner of Internal Revenue, supra*, 283 *U. S.* 589: (*Record page* 37):

"The Supreme Court sustained the right of the Commissioner to collect the entire deficiency through summary proceedings from Phillips alone. It did not, however, rule upon the right

> of Phillips to obtain contributions from the other stockholders. That is the question before us."

We respectfully submit that the difficulty in the contention of the plaintiffs is that they fail to make a distinction between what is a fair obligation and what is a legal obligation, relative to which and speaking for the Estate of B. C. Guldin, deceased, one of the respondents, and for the heirs of B. C. Guldin, deceased, none is financially able to pay the proportion of the contribution of the said B. C. Guldin toward the assessment made against I. L. Phillips by the Commissioner of Internal Revenue and demanded by the plaintiffs, and, hence, said respondent has contested this claim and is obliged to stand squarely on the law in the case, and not upon the determination of the question as to whether it is fair for this respondent to take such a stand and perspective in the matter. The undersigned, counsel for the Estate of B. C. Guldin, deceased, one of the respondents, has received no remuneration for his services, and expects to receive none.

We respectfully contend that there is no legal liability on the part of the respondents in this case which would afford the plaintiffs the legal right to enforce contribution by reason of the assessment made by the Commissioner of Internal Revenue against I. L. Phillips, because the assessment was not made by the Commissioner of Internal Revenue against the respondents along with the said I. L. Phillips, but simply and solely against I. L. Phillips, and as the United States Circuit Court of Appeals said in its opinion affirming the decree of the District Court dismissing the plaintiffs' bill: (*Record page* 37):

"The appellants would by implication add another method of imposing an assessment upon the stockholders, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established."

We, therefore, respectfully submit that the decree of the United States Circuit Court of Appeals affirming the decree of the District Court dismissing plaintiffs' bill in equity, should be affirmed.

Respectfully submitted,

PRALL B. ROADS,

Attorney for Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, deceased, one of the respondents.

SUPREME COURT OF THE UNITED STATES.

No. 45.—October Term, 1937.

Phillips-Jones Corporation, et al., Petitioners,
vs.
Lottie E. Parmley, Executrix of the Estate of C. S. Parmley, Deceased, et al.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 6, 1937.]

Mr. Justice Brandeis delivered the opinion of the Court.

The sole question for decision is the stockholder's right to contribution.

In 1919, the Coombs Garment Company, a Pennsylvania corporation, wound up its affairs and distributed its assets ratably among its eleven stockholders. In 1924 and 1925, the Commissioner of Internal Revenue assessed against the company additional income and profits taxes for the years 1918 and 1919. To the extent of $9,306.36 these taxes remained unpaid. I. L. Phillips, a stockholder resident in New York City, had received in 1919 liquidating dividends in excess of that amount. In 1926, the Commissioner notified Phillips that it was proposed to assess against him as transferee of the corporation's assets this sum of $9,306.36, pursuant to § 280 (a) (1) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 61). No notice of the deficiency was sent by the Commissioner to any of the other stockholders; no assessment was made against any of them; and no proceeding was instituted by him against any of them.

Phillips having died, his executors contested the deficiency assessed against the company and both the validity and the amount of the assessment made against him, insisting among other things, that in no event could Phillips' estate be held liable for more than his pro rata portion of the unpaid tax of the company. The Commissioner adhering to his determination, the executors sought a review by the Board of Tax Appeals. It held Phillips' estate liable for the full amount. 15 B. T. A. 1218. The United States Circuit Court of Appeals for the Second Circuit affirmed that judgment, 42 F. (2d) 177. And, in *Phillips* v. *Commissioner*, 283 U. S. 589, we affirmed the judgment of that court.

The Phillips-Jones Corporation, which was the real owner of the stock standing in Phillips' name, paid the judgment and the expenses of the litigation. Then it and Phillips' executors brought, in the federal court for eastern Pennsylvania, this suit in equity for contribution against the eight stockholders or their representatives, resident in that State. The District Court dismissed the bill for want of equity, on the ground that liability for the taxes arose solely from assessment under § 280; and that since the defendant stockholders had never been assessed they were not liable for contribution. In affirming that judgment the Circuit Court of Appeals said (88 F. (2d) 958, 959):

"Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commissioner prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress for imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established."

We granted certiorari. The injustice of allowing the other stockholders to escape contribution is obvious. And there is nothing in the applicable statutes, or the unwritten law, which compels our doing so.

First. The liability of the stockholders for the taxes was not created by § 280. It does not originate in an assessment made thereunder. Long before the enactment it had been settled under the trust fund doctrine (see *Pierce* v. *United States,* 255 U. S. 398, 402-03) that if the assets of a corporation are distributed among the stockholders before all its debts are paid, each stockholder is liable severally to creditors, to the extent of the amount received by him; and that as between all stockholders similarly situated the burden of paying the debts shall be borne ratably. But because the Commissioner was free to pursue Phillips alone for the entire amount of the unpaid taxes, Phillips could not compel him to join other stockholders in the proceeding, as was said in *Phillips* v. *Commissioner, supra,* p. 604:

"Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to

marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders."

Second. The right of a stockholder transferee to contribution arises under the general law and does not differ from that of any other person who has paid more than his fair share of a common burden. The right to sue for contribution does not depend upon a prior determination that the defendants are liable. Whether they are liable is the matter to be decided in the suit. To recover a plaintiff must prove both that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the common obligations.[1] Every defendant may, of course, set up any defense personal to him.

Since the enactment of § 280, as before, a bill in equity against a stockholder transferee is a remedy available to the Commissioner to enforce the tax liability of the corporation. *Leighton* v. *United States*, 289 U. S. 506; *Hulburd* v. *Commissioner*, 296 U. S. 300, 303. If he had resorted to that remedy he could have sued Phillips alone (see *Phillips* v. *Commissioner*, *supra*, pp. 603-604); and if thereupon Phillips had paid the entire tax, obviously he could have brought a bill in equity against the other stockholders for contribution.[2] The right is no less where the Commissioner proceeds under § 280. This statute does not affect the duty of other stockholder transferees to contribute; it merely provides the Commissioner with a summary remedy for enforcing existing tax liability. *Phillips* v. *Commissioner*, *supra*, pp. 592, 594. As an incident of this summary remedy, the Commissioner must make an assessment against the stockholder or stockholders whom he elects to pursue. But, as each stockholder transferee is severally liable to the extent of the assets received by him, the Commissioner may pursue only one and need not make an assessment against other transferees. He elected to proceed only against Phillips; and as he succeeded in obtaining payment of the whole tax from Phillips' estate, he had no occasion to make an assessment against other stockholders. Indeed, after the corporation's tax had been paid he had no power to do so.

Reversed.

---

[1] Compare Lidderdale v. Robinson, 12 Wheat. 594; Wright v. Rumph, 238 Fed. 138 (C. C. A. 5); United States Fid. & Guar. Co. v. Naylor, 237 Fed. 314 (C. C. A. 8); Carter v. Lechty, 72 F. (2d) 320 (C. C. A. 8); Allen v. Fairbanks, 45 Fed. 445 (C. C. D. Vt.); see M'Donald v. Magruder, 3 Pet. 470, 477; Southern Surety Co. v. Commercial Cas. Co., 31 F. (2d) 817, 819 (C. C. A. 3).

[2] Compare Richter v. Henningshan, 110 Cal. 530.